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CPLR 3120: Amendment

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Modern Fibers, Inc. v. Puro [56] held, in accordance with this section, that the defendant has priority to the extent that he may first examine the plaintiff with respect to all "material and necessary" evidence. The plaintiff may then examine the defendant. The court also noted that a defendant-by-counterclaim [57] should be accorded priority with respect to examinations concerning "matters which are material and relevant solely by reason of the allegations of the counterclaims." [58] However, since, in the instant case, certain defendants-by-counterclaim had not yet been served with process, since certain of them were objecting to the jurisdiction of the court, and since issue had not been completely joined on the counterclaims, the court held that it would be improper to provide for examinations by or of such defendants. The court's decision with respect to the priority to be accorded the defendants-by-counterclaim seems to be a logical extension of 3106(a), since the defendant in the original action becomes, in effect, the plaintiff as to the counterclaims.

CPLR 3116(a): Amendment.

CPLR 3116(a) has been amended to require that any alteration which the witness wishes to make in a deposition be placed "at the end of the deposition." This rule, as amended, makes it clear that the original deposition is not to be altered no matter how defective the witness might claim it to be. Prior to this amendment, corrections were often made by striking out the original and inserting new language between the lines or at the foot of the page in which the defective matter appeared. This procedure will no longer be acceptable. Now, the most convenient way to make the changes would be to footnote the point where a correction is desired and then at the *end* of the deposition to spell out the correction keyed to the footnotes.

For a more detailed discussion of this amendment, see Professor David D. Siegel's *1966 Commentary* in McKinney's CPLR.

CPLR 3120: Amendment.

The rules of CPLR 3120 concerning discovery have been extended to apply to non-party witnesses as well as to parties. Before the amendment, a person seeking discovery against a non-party witness had to resort to a 3111 EBT of the non-party.

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[56] 26 App. Div. 2d 527, 271 N.Y.S.2d 81 (1st Dep't 1966).

[57] If *B*, the defendant in the original action, serves a counterclaim on the plaintiff and on *C* and *D* and serves them with process they become defendants-by-counterclaim.

[58] Modern Fibers, Inc. v. Puro, 26 App. Div. 2d 527, 527-28, 271 N.Y.S.2d 81, 82 (1st Dep't 1966).

Such a procedure required an undesired EBT with much wasted time, effort and expense which resulted in a more restricted discovery than the one now given under CPLR 3120.

The amendment retains the content of the previous section concerning the party but places this material under subdivision (a). Subdivision (b) is completely new and permits discovery and production of information from a non-party witness by referring directly back to subdivision (a). However, there are important differences between (a) and (b).

For a full discussion of this amendment, see Professor David D. Siegel's *1966 Commentary* in McKinney's CPLR.

CPLR 3126: Attorney fees not given as penalty for failure to disclose.

Under CPLR 3126, if a party refuses to comply with an order for disclosure, or wilfully fails to disclose information which a court finds should have been disclosed, the court may, *inter alia,* strike out the defendant's pleadings until the order is obeyed, or render a default judgment against the disobedient party.[59] In order to provide for an alternative to the harsh sanctions contained in CPLR 3126, the Judicial Conference in 1966 recommended the addition of a new section to the CPLR. This section would permit courts to require parties who make disclosure motions necessary, *i.e.,* parties who ignore a *notice* of disclosure, to pay costs and expenses. This penalty would be imposed unless failure to disclose was "unavoidable" or "justifiable." [60] This recommendation was never acted upon by the legislature. However, case law has provided its own alternatives to the provisions expressed in CPLR 3126. In *Nomako v. Ashton,*[61] the court refrained from implementing the drastic penalties of CPLR 3126, but only upon the condition that the wrongdoer pay his adversary's full bill of costs, including costs and disbursements on appeal and counsel fees.

In *Nomako,* the defendant failed to obey a *court order* for disclosure. Since *notice* is also a method of obtaining disclosure, the question arose whether CPLR 3126 was applicable to the disregard of a disclosure notice.[62] In *Gaffney v. City of New York,*[63] the court held that mere notice of disclosure is not enough.

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[59] CPLR 3126(3).

[60] 1966 N.Y. LEG. DOC. No. 90, ELEVENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE 195.

[61] 22 App. Div. 2d 683, 253 N.Y.S.2d 309 (1st Dep't 1964). See also Warner v. Bumgarner, 49 Misc. 2d 488, 267 N.Y.S.2d 825 (Sup. Ct. Monroe County 1966); Di Bartolo v. American & Foreign Ins. Co., 48 Misc. 2d 843, 265 N.Y.S.2d 981 (Sup. Ct. Suffolk County 1966).

[62] See 7B McKINNEY'S CPLR 3126, supp. commentary 160-69 (1965).

[63] 41 Misc. 2d 1049, 247 N.Y.S.2d 419 (Sup. Ct. Queens County 1964).